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### **Sanctions**

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## A. Introduction

1 There are few legal concepts which polarize so many different and, sometimes, antagonist connotations than that of 'Sanction', a notion which, at the same time lies at the heart of the determination of the nature of an order as legal or not. In effect, many writers consider sanctions to be the very criterion for the identification of a legal (compared to a non-legal) order (see Kelsen [1953] 13-17; see also Laquière, at 1381) or, at least, as the condition for its effectiveness. In this Kelsenian (or Kelsen-inspired) conception, the legal order is characterized by the fact that rules are backed up by acts of constraint which come into play in case of their violation; this specificity would actually distinguish the legal order from other types of normative orders: 'Law is, by its very nature, a coercive order. A coercive order is a system of rules prescribing certain patterns of behaviour by providing coercive measures, as sanctions, to be taken in case of a contrary behaviour, or, what amounts to the same, in case of violation of the law' (Kelsen [1951] 706).

2 However, such a conception of the legal order could eventually cast doubt on the legal character of the international order, traditionally considered as lacking a systemic arsenal of sanctions to ensure → *compliance* with its rules. As Hart explained, '[t]his theory ... identifies 'having an obligation' or 'being bound' with 'likely to suffer the sanction or punishment threatened for disobedience'. Yet ... this identification distorts the role played in all legal thought and discourse of the ideas of obligation and duty' (Hart 217-218).

3 This Hartian way of thinking is nowadays preponderant and the legal character of the international order is no longer disputed on the ground that it lacks a system of sanctions. The quarrel on the role of sanctions in the identification of an authentic legal order has nonetheless left traces in the international discourse. These traces are visible in the originally broad meaning of sanctions that the legal writers conveyed in order to demonstrate and assure the legal character of the international order.

## B. Criteria for the Identification of Sanctions

4 Thus, the concept of sanctions was (and still sometimes is) defined as encompassing all the mechanisms of enforcement, functioning as guarantees for compliance with the → *rule of law* (Romano 15-16). In this broad acceptance the word 'sanctions' designates all types of consequences triggered by the violation of an international legal rule. These consequences range from a series of soft, unstructured social reactions, such as pressures from → *public opinion*, and name-and-shame politics (Damrosch 19-20; see also → *Mass Media, Influence on International Relations*), to a variety of organized effects attached to the non-respect of a legal rule. The latter category includes non-coercive consequences such as → *nullity in International Law* of the act that does not respect the conditions for its validity (Austin 457; see also Virally 221; *contra* Hart 33-34), the *exceptio non adimpleti contractus* principle or the mechanism of → *State responsibility*, as well as coercive measures, with some involving the use of force (→ *Reprisals*, → *Self-defence*), and some not (→ *Boycott*, → *Retorsion*).

5 Such a broad understanding hardly copes with either the Kelsenian or the Hartian conceptions of sanctions, which rest upon the persuasive force of → *coercion* to bring the targeted State (or other international law subject) back to legality. Indeed, the legal discourse has gradually come to reserve the use of the term 'sanctions' to the measures of constraint taken either by States or by international organizations in order to restore the

international legality, broken by the illicit act of an international legal subject. Such a view was predominant until the 1990s (see Dupuy).

**6** It must be noted that such an understanding includes, under the heading of ‘sanctions’, measures of self-help taken individually by the injured State (or international organization) to ensure compliance with the obligations owed to it by another subject (unilateral sanctions), as well as the institutional decisions of international organizations meant to restore the international legality, in cases where the sanctioning entity suffered no direct injury (multilateral sanctions). The distinction between the two categories is nonetheless fundamental: whereas the unilateral measures taken by the injured entity disclose a form of private justice (see Alland [1994] 24–26 in particular), the latter reveal a form of recognition of the existence of an international community and of centralization or institutionalization of the international society, with the international organization playing the role of guardian of the global legality.

**7** It is, however, not surprising that in a rather primitive legal order such as public international law, with no centralized institutions to establish the violation of rules and to ensure their enforcement, this double function is mainly incumbent upon States. As a consequence, it is sustained that any unilateral coercive measure taken in reaction to an unlawful act may be called ‘sanction’ (Salmon 1017). This broad definition includes both what is now commonly referred to as ‘counter-measures’ and afflictive acts decided by an entity or institution acting in the name of the international community and in the interest of this community as a whole.

**8** Such an approach is not without difficulty: not only does it cover two very different phenomena, it also seems to limit the scope of sanctions to coercive acts meant to re-establish international legality while, in the contemporary world, the main purpose of centralized sanctions is the preservation or re-establishment of international peace and security. For the sake of clarity it seems therefore more appropriate and operational to define sanctions as socially organized acts of constraint. Thus Abi-Saab (at 35) defines ‘sanctions’ as ‘[c]oercive measures taken in execution of a decision of a competent social organ, iean organ legally empowered to act in the name of the society or community that is governed by the legal system’. In such a conception, ‘sanctions’ involve three cumulative characteristics: they are coercive (constraint) measures; they bear an afflictive dimension; and they are based upon a collective decision. Excluded from the scope of such a definition are both non-coercive measures (the purely legal sanctions such as the nullity of an act, or the soft mechanisms of condemnation by public opinion) and unilateral measures taken by States or international organizations as a reply for a breach of their rights which constitute counter-measures. This evolution is reflected in the drafting history of Art. 22 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts (‘ILC Articles’) now entitled ‘Countermeasures in Respect of an Internationally Wrongful Act’, which originates from a draft article proposed by Roberto Ago in 1962 entitled ‘Legitimate Application of a Sanction’ (ILC Yearbook vol II Part I 47 para. 99). In doing so, the Commission made an allowance:

for the trend in modern international law to reserve the term ‘sanction’ for reactive measures applied by virtue of a decision taken by an international organization following a breach of an international obligation having serious consequences for the international community as a whole, and in particular for certain measures which the United Nations is empowered to adopt, under the system established by

the Charter, with a view to the maintenance of international peace and security (ibid Art. 30, Commentary, 121 para. 21).

**9** At the heart of the strict conception, which prevails in today's practice, lies the postulate that the international society has an organ competent first, to objectively establish the violation of a legal rule, and second to impose the coercive measures meant to constrain the targeted entity to restore the legality. "This is because such a decision must be based on "finding" and not a mere "contention" or "allegation" resulting from the "self-interpretation" of the situation by the other party. Moreover, this "determination" must be accompanied by a "decision", ordering or recommending the measures to be taken on the basis of this finding' (Abi-Saab 39; see also Picchio-Forlati and Sicilianos [2004] 21).

**10** The evolution of the legal discourse in this direction, mirroring that of the practice, is remarkable and the refinement of the concept of 'sanctions' noticeable: though the term might still occasionally designate the unilateral reactions of enforcement of the system of responsibility by an injured State, it is nonetheless used more and more to designate the sanctions imposed or mandated by competent international organizations. The good fortune of the notion of *countermeasures*, a concept designed to cover the first category of enforcement measures, partially explains this terminological evolution.

**11** The other explanation is linked to the reawakening of the Security Council in the 1990's (→ *United Nations, Security Council*), its abundant practice since then giving concrete expression to something that, for a long time, was only seen as a potentiality provided for by the → *United Nations Charter*. This evolution has accredited the idea that the international legal system is endowed with a mechanism of centralized sanctions, since the United Nations is the only organization whose membership and competences are large enough to represent the international society as a whole, and the Security Council enjoys the power to decide and to enforce its decisions. However, this institutionalized mechanism remains unpredictable, so that, in parallel with the development of measures decided by the Security Council and, marginally, some other international organizations, 'third-party countermeasures', 'that is to say, peaceful unilateral coercive measures adopted by a non-directly injured State in defence of the public interest and not otherwise justified under international law' (Dawidowicz 333), have flourished on the margins of the law.

## **C. UN Security Council Sanctions under Chapter VII of the UN Charter**

**12** The origins of the mechanism established under Chapter VII of the Charter can be found in Art. 16 Covenant of the → *League of Nations*, the first paragraph of which reads as follows:

Should any Member of the League resort to war in disregard of its covenants under Articles 12, 13 or 15, it shall *ipso facto* be deemed to have committed an act of war against all other Members of the League, which hereby undertake immediately to subject it to the severance of all trade or financial relations, the prohibition of all intercourse between their nationals and the nationals of the covenant-breaking State, and the prevention of all financial, commercial or personal intercourse between the nationals of the covenant-breaking State and the nationals of any other State, whether a Member of the League or not.

**13** The Covenant was thus empowering Member States to react to a breach of peace in violation of its provisions through a series of measures, some of which involved the use of force. However, States remained free to determine whether any such violation had occurred.

**14** Chapter VII of the UN Charter is, in a sense, the improved legacy of Art. 16 of the Covenant: both mechanisms rest upon the idea of → *collective security* as a substitute for unilateral measures of self-defence. However, in contrast with the Covenant, the Charter endows a central organ first to establish the existence of a threat to, or a breach of, the peace (Art. 39), and then to decide the measures to be taken (cf Arts 41 and 42) to insure or restore it.

## **1. The Triggering of Chapter VII Sanctions**

**15** Chapter VII opens with Art. 39, by virtue of which '[t]he Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security' (→ *Peace, Threat to*; → *Peace, Breach of*; → *Aggression*). It is thus remarkable that Chapter VII, or generally the Charter, only envisaged sanctions against a State threatening or breaching the peace—not upon the violator of international law as such. As Kelsen put it: 'The purpose of the enforcement action under Article 39 is not: to maintain or restore the law, but to maintain, or restore peace, which is not necessarily identical with the law' (Kelsen [1951] 294; see also Bennouna 27). It is therefore apparent that the Security Council 'is not specifically authorized to adjudicate on wrongful conduct and to respond to it in its character as such' (Crawford in Gowlland-Debbas [ed] [2001] 58).

**16** However, it can be considered that, in the overwhelming majority of cases, a threat to the peace or a breach of the peace will result from a breach of international law and that, in any case, the Security Council, when determining the existence of a threat to, or a breach of, the peace, creates by the same token ad hoc obligations for the targeted entity to refrain from such action. The sanctions under Arts 41 and 42 are consecutive to the violation of such an obligation (see Kelsen [1951] 736) and are meant to give effect to its action under Art. 39. As Combacaurightlyunderlined:

le Conseil de sécurité reconnaît dans un acte sur lequel la Charte ne statue pas directement l'élément constitutif d'une situation illégale de l'art. 39 et prend contre son auteur les mesures prévues par les art. 41 et suivants; le chapitre VII ne l'investit d'aucun 'rôle législatif' mais d'une fonction normative dérivée, quasi-juridictionnelle et apparemment rétroactive, qui consiste à concrétiser l'obligation, imprécise mais incluse dans la Charte, de s'abstenir de tout acte constitutif d'une menace pour la paix ou d'une rupture de la paix, et de tout acte d'agression:

[The Security Council acknowledges that an act not directly qualified under the Charter is the constitutive element of an illegal situation falling under Art. 39 and takes against its author the measures provided for by Art. 41 *et sequitur*; chapter VII does not entrust it with any 'legislative' role, but it does grant it a secondary normative function, quasi-jurisdictional and apparently retroactive, consisting for the Council to score the obligation, imprecise but nonetheless included in the Charter, to abstain from any act constituting a threat to, or a breach of the peace, and from any act of aggression] (Combacau 16 [footnotes omitted]; see also *ibid* 86–92 and 104–106).

**17** The practice of the Security Council confirms that, in most cases, the characterization of a situation as a threat to the peace is triggered by a violation of international law, so serious that the Security Council considers that it amounts to a threat to, or even a breach of the peace. This is so a fortiori for the measures decided as a reply to an act of aggression which is always unlawful by and in itself. In this respect, the dichotomy between peace and law proves misleading, the two being in large part interdependent (*contra*: d'Argent; d'Aspremont; Dopagne; van Steenberghe in Cot, Pellet and Forteau [eds] 1137).

**18** Moreover, a synthesis of the two conceptions is possible if one accepts that the Council is:

une sorte de promoteur universel de l'ordre public, au double sens du terme: celui de la sécurité collective, mais également celui des valeurs et principes d'ordre public, au sens où l'on désigne par là les règles fondamentales hors du respect desquelles il ne saurait y avoir de vie collective dans une société ordonnée

[a sort of universal promoter of the public order, in the two senses of the word: that of collective security and that of principles of public order, meaning the fundamental rules without whose respect there cannot be social life in an ordered society] (Dupuy in Gowlland-Debbas [ed] 48).

**19** Quite often, the Security Council identifies breaches of international law which call for enforcement measures, whether in a previous resolution to that imposing sanctions (UNSC Res 1696 [2006] concerning the situation in Iran specifying the obligations imposed upon Iran, and UNSC Res 1736 [2006] imposing sanctions under Art. 41), or in the preamble of the same resolution (UNSC Res 1970 [2011] concerning the situation in Libya) or both (UNSC Res 1547 [2004] concerning the situation in → *Sudan* makes general references to human rights and humanitarian law violations, whereas UNSC Res 1556 [2004] makes them more explicit and establishes a sanctions regime). Sanctions thus become, beyond any doubt, a form of law enforcement.

**20** This is all the more so since the notions of threats to, or breaches of, the peace in Art. 39 are polysemous: they were used by the Security Council to cover:

- inter-State conflicts (→ *Korea*: UNSC Res 82, 83, 84 [1950]; → *Falkland Islands/ Islas Malvinas*: UNSC Res 502 [1982]; → *Iran-Iraq War [1980-88]*: UNSC Res 598 [1987], → *Iraq-Kuwait War [1990-91]*: UNSC Res 660 [1990]; the Eritrea-Ethiopia conflict: UNSC Res 1640 [2005]; the Eritrea-Somalia conflict: UNSC Res 1907 [2009] and 2002 [2011]; → *Eritrea*);

- internal conflicts (→ *Somalia, Conflict*: UNSC Res 794 [1992], 1425 [2002], 1519 [2003], 1587 [2005], 1844 [2008], 1972 [2011]; *Sudan*: UNSC Res 1556 [2004], 1591 [2005], 1679 [2006]; → *Côte d'Ivoire*: UNSC Res 1572 [2004], 1643 [2005], 1727 [2006], 1782 [2007], 1842 [2008], 1893 [2009], 1946 [2010], 1975 [2011], 1980 [2011]; *Mali*: UNSC Res 2085 [2012]);

- breach of the principle of democracy and of the constitutional order (→ *Haiti, Conflict*: UNSC Res 940 [1994]; → *Sierra Leone*: UNSC Res 1132 [1997]);

- human rights or humanitarian law violations (→ *Burundi*: UNSC Res 1577 [2004]; *Côte d'Ivoire*: UNSC Res 1633 [2005]; *Libya*: UNSC Res 1970 [2011]);

- → *terrorism* (UNSC Res 1267 [1999], 1373 [2001], 1390 [2002], 1735 [2006], 1822 [2008], 1904 [2009], 1989 [2011], 2082 [2012], 2083 [2012]);
- → *piracy* (UNSC Res 1816 [2008], 1976 [2011])
- proliferation of nuclear, chemical and biological weapons (UNSC Res 825 [1993], 1540 [2004], 1695 [2006], 1718 [2006], 1887 [2009], 2087 [2013], 2094 [2013]).

**21** The enlargement of the notion of a threat to the peace is evidenced in the shift in the notion of security as encompassed by the Charter. As Gowlland-Debbas noticed, '[t]he move from a State-oriented to a more individually-oriented international legal system has meant that the term security referred to in Article 1(1) can no longer be confined but must ultimately be destined to the protection of individuals. The various reports and declarations on UN reform are replete with references to 'human security' alongside state security, even though the former is not an entirely new concept, nor has it been defined .... The concept of human security has been reflected in the use of Chapter VII measures for the protection of populations as opposed simply to the protection of States, emphasizing individual rights and human dignity' (Gowlland-Debbas [2007] 262). This shift entailed that the sanctions mechanisms of Chapter VII can be used not only in case of a breach of State-oriented obligations, but equally of individually-oriented rights. Thus the area of legal rules protected by the Security Council enforcement measures has widened.

**22** The elasticity of the notion of a threat to, or breach of, the peace was accompanied by an enlargement of the category of targeted entities; as a consequence, it is no longer necessary that a violation of international law amounting to a threat to the peace be attributable to a State in order to justify the imposition of sanctions. Individuals or groups can violate international law and be subject to sanctions.

**23** When a violation is found to be the basis of Security Council sanctions, this entails, as a corollary, that the ultimate goal of such sanctions is the restoration of the international legality; '[l]a sanction a donc pour fonction de faire pression sur le destinataire pour l'amener à se conformer à la légalité internationale, telle qu'elle ressort des décisions du Conseil de sécurité' [(t)he function of the sanction is therefore to exert a pressure on the addressee to induce it to comply with the international legality, stemming from the decisions of the Security Council] (Bennouna 19; see also 23). Law-enforcement is therefore the most frequent finality of Chapter VII sanctions (Combacau 23-24; see also Abi-Saab 67; Bennouna 24; Sicilianos [2004] 15). This implies that sanctions must also be reversible--once the return to legality is obtained, sanctions must be lifted: 'Coercition et réversibilité constituent, en réalité, les deux faces de la médaille' [Coercion and reversibility are the two sides of the same coin] (Sicilianos *ibid*).

**24** On the other hand, while sanctions are necessarily afflictive since they restrict the rights of the targeted entity, they are not necessarily punitive since, under the cover of a threat to the peace, they may anticipate a violation not yet committed. On this basis, UN organs insist that measures under Chapter VII are preventive and not punitive (Third Report of the Analytical Support and Sanctions Monitoring Team Appointed pursuant to Resolution 1526 [2004] concerning Al Qaeda and the → *Taliban* and associated individuals and entities paras 39-41; see also Joined Cases C-584/10 P, C-593/10 P and C-595/10 P *European Commission, Council of the European Union, United Kingdom of Great Britain and Northern Ireland v Yassin Abdullah Kadi (Opinion of Advocate General Bot)* [2013] para. 68).



**25** However, the Chapter VII mechanism is highly contingent: not all gross violations of fundamental principles of international law trigger it; it can be triggered for other reasons; and even when it is activated, it can be paralyzed by a → *veto* from one of the five permanent members or the lack of a majority of nine out of 15 votes. It can therefore not be the exclusive means of law enforcement in the international legal order and it must necessarily coexist with other forms of sanctions (*lato sensu*), such as countermeasures.

## **2. Evolution of the Practice of Sanctions**

**26** Until the fall of the Berlin wall, recourse to sanctions under Chapter VII of the Charter was scarce and unorthodox. Within the framework of the → *Cold War (1947–91)*, the Council was largely paralyzed by the veto and could only decide upon sanctions in situations where none of the ‘Big Five’ (and first of all the United States and the USSR) or their protégés were involved.

**27** On several occasions when the Security Council qualified a particular situation as a breach of the peace (Palestine, Iran-Iraq war, Falkland Islands), such qualification was not followed by the imposition of sanctions. Only on two occasions did the Security Council overstep the veto obstacle and impose mandatory → *economic sanctions*: Southern → *Rhodesia/Zimbabwe* (for breach of the right to → *self-determination* of the African majority see UNSC Res 232 [1966], 253 [1968], 277 [1970], 333 [1973], 388 [1976] using the quasi-comprehensive panoply of Art. 41 measures) and South Africa (in an attempt to put an end to the → *apartheid* system, an arms embargo was established by UNSC Res 418 [1977], and was reinforced by UNSC Res 558 [1984]). However, in the latter case, all subsequent efforts to impose comprehensive economic sanctions were defeated, despite the UN General Assembly’s recommendations (UNGA Res 1899 [XVIII]). As for the military measures, the very special circumstances in which they could be decided concerning Korea (absence of the USSR from the Council, see UNSC Res 82 [1950]) have never occurred again.

**28** The situation radically changed in 1990 and, at least between that year and 1994, the whole array of sanctions envisaged in Arts 41 and 42 Charter were resorted to. In spite of a marked slowing down of this trend since then, sanctions under Chapter VII are now in common usage. But it can be noted that, during the two ‘sanctions decades’, the UN Security Council’s practice of sanctions went through a double process of refinement: *ratione materiae*, their scope was reduced to a series of specific economic or political measures; and *ratione personae*, the Security Council nominally identified the targets of these measures or created a UN centralized procedure for such identification.

### **(a) From Global to Smart Sanctions**

**29** Chapter VII envisages two categories of enforcement measures: Art. 41 covers measures ‘not involving the use of armed force’, while Art. 42 authorizes the Security Council to use the coercive military force ‘to maintain or restore international peace and security’. A difference of paramount importance separates the two mechanisms: whereas the economic sanctions of Art. 41 are intended to coexist with similar unilateral measures taken by States (or other international organizations), the measures of Art. 42 come within the exclusive competence of the Security Council. They are a substitute for the unilateral use of force. However, failing the conclusion of the agreements provided for in Art. 43, the action of the Council under Art. 42 is conditioned by the availability of ‘forces of Members of the United Nations’.

**30** The Security Council has nonetheless authorized on a number of occasions, through a particularly laconic formula, the use of armed force by Member States: ‘Authorize[d] [Member States] ... to take all necessary measures’ (UNSC Res 678 [1990] after the invasion of Kuwait by Iraq, UNSC Res 794 [1992]); allowed intervention in Somalia (UNSC Res 940 [1994]); protected civilians under imminent threat of physical violence in Côte d’Ivoire (UNSC 1609 [2005]); and protected civilians and civilian populated areas under threat of attack in Libya (UNSC 1973 [2011]). The same formula is used for establishing the right of peace-keeping forces to use force (UNSC Res 1546 [2004]) for the coalition forces in Iraq (for the interpretation of this resolution, see → *European Court of Human Rights [ECtHR] Case 27021/08 Al-Jedda v United Kingdom* [7 July 2011] [passim]; UNSC Res 1551 [2004], for the forces in → *Bosnia-Herzegovina*; or UNSC Res 1563 [2004] for the multilateral forces in Afghanistan, 1672 [2006]; → *Afghanistan, Conflict*; see also the examples provided in the *Repertoire of the Practice of the Security Council*, under Art. 42).

**31** Whether authorizations for the use of force fall within the ambit of Art. 42 is still debated. The Security Council has never formally invoked this article, and the relevant decisions simply make a general reference to Chapter VII. The question also arises whether the measures taken by States in application of these decisions can qualify as sanctions. Since the Security Council did not decide upon the specific measures to be taken, this is at best a hybrid form of sanctions (or another substitute for institutionalized sanctions), based upon a collective finding of a threat to, or breach of, the peace, but without necessarily entailing collective measures properly said. In any case, States incur full responsibility for acts taken under the empire of such an authorization if they amount to a violation of their international obligations (*ECtHR Case 27021/08 Al-Jedda v United Kingdom* and *Case 55721/07 Al-Skeini v United Kingdom*).

**32** The end of the Cold War permitted a prompt reaction of the Security Council against the invasion of Kuwait by Iraq. Not only did the Security Council authorize the use of force by a coalition of willing countries (UNSC Res 687 [1990]), but it also immediately imposed a comprehensive economic embargo (UNSC Res 661 and 670 [1990]) (see Cortright Lopez and Gerber-Stellingwerf 207–210). A similar model of comprehensive economic sanctions was applied in the context of the dissolution of Yugoslavia (→ *Yugoslavia, Dissolution of*) and the subsequent conflicts (UNSC Res 757 [1992], further strengthened by UNSC Res 787 [1992] and 820 [1993]), after the unsuccessful arms embargo imposed by UNSC Res 713 (1991) and 724 (1991) and of the coup d’état in Haiti (UNSC Res 841 [1993] and 917 [1994]) (for a detailed analysis see Gowlland-Debbas [2004] 6–11).

**33** These global sanctions ranged from a quasi-general trade embargo (in the case of Haiti an embargo was only imposed for oil and oil products) and an arms embargo, to financial sanctions and an overreaching ban on all means of transportation. Whereas in Rhodesia’s case, sanctions were strengthened gradually, stretching out over several years. In the 1990’s, the Security Council chose to apply from the outset a large spectrum of measures, hoping for a speedy change in the attitude of the targeted State’s officials. However, these sanctions rapidly had serious humanitarian consequences upon the population of the State (Reisman and Stevick 101–124; as for Iraq, see also the 1991 Report on Humanitarian Needs in Iraq in the Immediate Post-crisis Environment by a Mission to the Area Led by M Martti Ahtisaari, the Under-Secretary-General for Administration and Management). As Cortright noted, ‘[t]he record of Security Council sanctions since 1990 is one of striking contrast, if not contradictions. As the Council moved forcefully to use sanctions as a means for advancing the UN mandate to preserve peace and security ... it found that the outcomes

of these measures were undermining other dimensions of the UN agenda, especially the goal of improving the human condition' (Cortright Lopez and Gerber-Stellingwerf 207).

**34** Despite UN efforts to address these humanitarian consequences (→ *Oil for Food Programme* or humanitarian exceptions concerning food or medical materials, provided for by the sanctioning resolution), support for economic global sanctions, which resembled → *collective punishment* rather than an effective pressure capable of influencing the behaviour of leaders', seriously weathered out. The UN responded to these criticisms by modifying the scope of the measures decided: after the sanctions in the case of Haiti, the global sanctions were abandoned in favour of more targeted sanctions. Conceived in such a way as to avoid adverse consequences for the population, the targeted (or smart) sanctions were considered to focus upon the 'delinquent rulers' (Millennium Report para. 356). These kind of sanctions included financial sanctions, travel bans, arms embargoes, and embargoes on specific commodities (eg diamonds in the cases of → *Angola*, UNSC Res 1127 [1997] and Sierra Leone, UNSC Res 1306 [2002] in order to cut down one of the rebels' sources of financing; see also → *Kimberley Process*).

**35** Consequently, the practice of sanctions changed from State-oriented to individual-oriented sanctions, since these specific measures, by their nature, could only be applied to specific targets. There was thus a shift from the prohibition or restriction of the movement of funds and the freezing of government assets, to blocking the accounts of or imposing travel bans on designated entities and individuals.

### **(b) The Listing System**

**36** As early as 1994 (UNSC Res 917 [1994] para. 3 concerning the military officers involved in the coup d'état in Haiti), the Security Council experienced a model of sanctions based on listings nominally designating individuals (see also for the UNITA's leaders and their families UNSC Res 1127 [1997] para. 4 and for the leading members of the military junta in Sierra Leone UNSC Res 1171 [1998] para. 5). However, in these instances, the designated individuals were apprehended functionally, as members of a government or of a political faction based in a particular State. With the anti-terrorist resolutions (see, inter alia, UNSC Res 1390 [2002], 1452 [2002], 1455 [2003], 1526 [2004], 1617 [2005], 1735 [2006], 1904 [2009], 1989 [2011] concerning Al Qaeda and associated individuals and entities), the sanctions regime was completely de-territorialized and the link between the sanctions' target and a given State was broken.

**37** Such evolution was the logical outcome given threats to the peace not only in territorial crises, but also in global phenomena (terrorism, proliferation of arms of mass destruction). Both approaches coexist nowadays, sometimes in the framework of the same sanctions regime: thus, the sanctions directed to stop Iran and North Korea's nuclear programmes consist of a ban on a series of items, arms embargo and targeted sanctions against persons involved in the programme (see UNSC Res 1737 [2006], 1929 [2010], 1984 [2011] and respectively 1718 [2006], 1874 [2009], 2087 [2013], 2094 [2013]). By Resolution 1540 (2004), the proliferation of → *weapons of mass destruction* was qualified as a threat to the peace and the Council imposed upon States a series of obligations to contain the risk of private actors coming into possession of them. This equally presupposed that individuals or private entities were actually considered → *subjects of international law*, and having international obligations, which they could breach thus incurring the risk of being sanctioned at the international level.

**38** In directly subjecting private persons to its sanctions' regimes, the Security Council pierces the State (corporate) veil and removes, in a way, these targets from the protection of their national legal system. However, while particular attention was paid to the most effective way of restricting the rights of the persons listed, little was foreseen in terms of protecting their fundamental rights. Political and judicial critics led the Council to adapt and continuously reform the listing regime, providing for a series of guarantees for individual rights in the sanctions' implementation procedure.

### **(c) Sanctions' Implementation**

**39** The proper implementation of the sanctions regime rests first upon the sanctions committees that the Security Council establish as its subsidiary bodies when it decides sanctions under Chapter VII, but also ultimately upon the Member States or the regional organizations that are called to apply these measures *in concreto*. This multilevel implementation raises difficult questions relating to the relationship between the United Nations and the national (or regional) legal order, as a number of cases amply illustrate.

#### **(i) The Role and Functioning of the Sanctions Committees**

**40** Quite systematically, when establishing a sanctions' regime, the Security Council creates sanctions committees to participate in, and survey, its implementation (in March 2013, 13 were still functional and 13 had been abrogated). These committees are entrusted with the follow-up of the application of sanctions by States (an obligation of reporting was occasionally imposed upon States), with the examination of requests from the States particularly affected by the sanctions or with granting derogations, and most importantly with the establishment of lists of targets, their revision or with the radiation from a list. By endowing these committees with the competence to decide on the specific targets, the Security Council delegated to them a form of secondary normative power (see Kolliopoulos in Picchio-Forlati and Sicilianos [eds] 568).

**41** The committees are as much political organs as the Security Council itself: their composition mirrors that of the Council (with the slight difference being that their president is nominated for one year, whereas the Security Council's presidency lasts for six months). The same goes for their deciding procedure (→ *consensus*). They are entirely dependent on the Security Council, which controls their decisions—in particular, if 'consensus ... cannot be reached, the matter may be submitted to the Security Council' (1267 Sanctions Committee Guidelines) and ends their mandate as soon as a sanctions' regime is lifted.

**42** The decision procedure has nonetheless progressively taken an administrative turn, in the sense that it is submitted to a number of directives and guidelines meant to ensure its fairness. Such procedural framing has gradually been provided for by the Security Council as a means to compensate for the lack of judicial control over the listing. Starting in 2005, a number of resolutions provided for procedural safeguards to protect the rights of the persons listed and to avoid arbitrary decisions (see UNSC Res 1730 [2006], 1735 [2006], 1822 [2008], 1904 [2009], 1989 [2011]), applicable in particular to the most far-reaching sanctions regime adopted until now, namely the one concerning Al Qaeda and associated individuals and entities (the '1267 Committee').

**43** These rules provide for an obligation of motivation incumbent upon the States proposing the listing (UNSC Res 1617 [2005]), in order to enable the committee to decide on the appropriateness of the listing; the material criteria leading to listing were also refined, the committees are obliged to publish the lists on their websites and the States of residence of the listed person and to notify the listing to him or her; the principle of a periodic revision of listing has equally been laid down (UNSC Res 1735 [2006]); the listed person can indirectly expose his/her case to the committee, by seizing the Focal Point, a bureau established by UNSC Res 1730 (2006) to receive the files in defence. For the 1267

regime, the Security Council went a step further towards establishing a third-party control of the listing: it created for that purpose the Office of the Ombudsperson (UNSC Res 1904 [2009]) and strengthened its role two years later (UNSC Res 1989 [2011]). Persons or entities found on the 1267 Consolidated List can submit their request for delisting to an independent and impartial Ombudsperson, appointed by the Secretary-General. The role of the Ombudsperson is to gather information and entertain a dialogue with the person listed, eventually with the States concerned, and to make a report and a recommendation to the committee on the request for delisting. This recommendation, as the name indicates, is not binding; however, should the committee not follow this recommendation, the matter can be referred to the Security Council.

## **(ii) The Role of the National and Regional Legal Orders**

**44** The addressees of the sanctions resolutions are always the States, who have an obligation to implement them in their national legal orders. The Security Council thus uses a generic formula which ‘Decides that *all States* shall take the measures ...’ The Security Council thus imposes upon States the need to take the domestic measures necessary to give effect to its resolutions. This confirms that international law is dependent upon national law for its implementation.

**45** This raises the eternal question of the reception by States of international legal acts and of the relationship between international and domestic legal orders. The answer to that question is provided by the legal order of reception, namely the domestic order, and cannot therefore, by definition, be univocal. Some authors consider that the Security Council’s binding resolutions should be regarded as *self-executing* (Conforti 34–40), but in practice most countries assimilate sanctions decided under Chapter VII of the Charter to non-self-executing treaty obligations (Gowlland-Debbas [2004] 664; see also Guillaume 546). It follows that a domestic act will interpose itself between the decision imposing sanctions and its material execution by national entities. Such an implementation act can also emanate from a regional organization; this is the case of the European Communities then Union, whose acts are self-executing within its Member States’ national legal orders (see, for instance, Regulation No 881/2002, the annex of which reproduces the names of the persons appearing on the 1267 Sanctions Committee Consolidated List; the annexes to the European acts are amended following the amendments of the UN listing; see also the European Council Regulation No 204/2011 of 2 March 2011 implementing the sanctions imposed by UNSC Res 1970 [2011] in relation to the situation in Libya).

**46** Actually, the Security Council’s resolutions are rarely specific enough to be considered self-executing (although, throughout the years, they tend to be more and more definite: compare the four pages length of UNSC Res 1267 [1999] instituting the 1267 regime with the eighteen pages length of UNSC Res 1989 [2011], the last in date regulating it). Moreover, as already noted, the Council addresses States and not the economic operators amenable to execute the freezing or the travel ban. However, with the listing regime, the Security Council, although not imposing upon States specific ways to comply with sanctions, greatly reduces their margin of appreciation, since they can determine neither the material nor the personal scope of the sanctions. The listings are, from this point of view, individual sanctions that impose upon States pure obligations of result.

**47** The intervention of the national legal order is inescapable for the establishment of penalties for the violation of the sanctions’ regimes, an aspect scarcely dealt with at the UN level (only once did the Security Council decide sanctions against a State not complying with previous sanctions imposed upon another State—see UNSC Res 1343 [2001] against → *Liberia* for its violation of the ‘diamonds embargo’ against Sierra Leone). Once the Security Council has established a sanctions regime, it is incumbent upon States to establish the penalties for lack of compliance. Without necessarily expressing this in

mandatory terms, sanctions resolutions nonetheless require States to provide for a system of 'second degree' sanctions: 'calls upon States to bring proceedings against persons and entities within their jurisdiction that violate the measures imposed by paragraph 4 above and to impose appropriate penalties' (UNSC Res 1267 [1999] para. 8). Such penalties being of criminal character, the intervention of the domestic order is imperative, since, in principal, international organizations are incompetent to impose criminal sanctions (except for the international criminal courts and tribunals). This is applicable even within the European Union (see ECJ [29 June 2010] Case C-550/09 *Criminal Proceedings against E, F*). It must, however, be noted that it can happen that the Security Council includes among the sanctions it specifies the referral to the Prosecutor of the International Criminal Court of the situation at stake (see UNSC Res 1593 [2005] concerning Darfur and UNSC Res 1970 [2011] concerning Libya).

**48** Notwithstanding, these still isolated initiatives, domestic implementation acts are necessary in order to ensure the best efficiency to the sanctions' regime, since only the domestic level can ultimately enforce sanctions. Since the 'smart sanctions' impose obligations that cannot be executed without the participation of domestic legal subjects (economic stakeholders, banks, travel companies), domestic acts are the sole efficient means to make them comply with the sanctions. Efficiency, understood as prompt and uniform application, is also one of the reasons why implementation through the European Union regulations was the privileged way of implementation by its Member States (another reason being that, quite usually, the sanctions fall within the exclusive competence of the EU). Such a method does not, however, ensure blind compliance with the sanctions, since the implementing acts can be subject to the control of domestic (national or European) judges and ultimately annulled by them.

#### **(d) Legality of Sanctions and Judicial Control**

**49** In consideration of their adverse impacts upon the population of the targeted State and upon the human rights of the persons listed, the sanctions regime raises the difficult question of determining the obligations binding upon the Security Council, or the States implementing its decisions, when acting under the authority of Chapter VII. Since that Chapter grants the Council wide discretionary powers, one must determine first whether these powers are unlimited; in case of negative response, the source of the obligations imposing the limits to its action and the extent of these obligations must be identified.

**50** It is nowadays accepted that the international society is a legal community; therefore, the Security Council must be bound by a number of legal rules. As the → *International Criminal Tribunal for the Former Yugoslavia (ICTY)* Appeal Chamber put it in the → *Tadić Case*,

It is clear ... that the Security Council plays a pivotal role and exercises a very wide discretion under ... Article [39]. But this does not mean that its powers are unlimited. The Security Council is an organ of an international organization, established by a treaty which serves as a constitutional framework for that organization. The Security Council is thus subjected to certain constitutional limitations, however broad its powers under the constitution may be. Those powers cannot, in any case, go beyond the limits of the jurisdiction of the Organization at large, not to mention other specific limitations or those which may derive from the internal division of power within the Organization. In any case, neither the text nor the spirit of the Charter conceives of the Security Council as *legibus solutus*

(unbound by law) (*Tadić [Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction]* para. 28).

**51** → *Ius cogens* rules no doubt impose limitations to the Security Council's action and constitute essential parameters to assess the legality of its resolutions under Chapter VII. The obligations deriving from these rules being obligations 'from which no derogation is permitted' (Art. 53 → *Vienna Convention on the Law of Treaties [1969]*), the Security Council cannot free itself, nor liberate the Member States, from applying those rules, under the pretext it acts under Chapter VII of the Charter and a resolution contradicting such a peremptory norm ought to be considered null and void (for a judicial decision applying this reasoning in a debatable way given the context of the case, see General Court Case T-315/01 *Kadi v Council and Commission* paras 226–231; → *Kadi Case*). Similarly, since the Security Council holds its competence from the Charter, any resolution which would not comply with the Charter requirements, either formal or substantial, should be held invalid.

**52** However, while there is no reason why an international court or tribunal could not check the legality of the sanctions against these principles, it can be accepted that domestic courts lack the power to exercise direct control over the sanctions resolutions, with a view to annul them. However, there is no basis to exclude judicial control of the Security Council's sanctions, under the form of an *exception d'illégalité* (see in general Pellet [1995]; see also Bedjaoui [1995] 255–97 and [1994] 634).

**53** Thus, several European and national judicial decisions have annulled the domestic acts implementing sanctions decided by the Security Council for lack of compliance with fundamental rights (ECJ Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* [2008]; General Court Case T-85/09 *Kadi v Commission* [2010] T-85/09; see also *Nada v Switzerland* (ECtHR) (Grand Chamber) App 10593/08 [2012]; for a series of challenges before the national jurisdictions see Candas and Miron). If the domestic judges are careful to underline that judicial control upon the implementing acts does not imply control over the resolutions themselves, and do not engage in contesting their primacy on an international level, by virtue of Art. 103 UN Charter (Joined Cases C-402/05 P and C-415/05 P *Kadi v Council* paras 288–294), these annulments bear practical consequences at the UN level. While it is true that they leave intact the validity of the resolutions, they nonetheless impair their efficiency, which is dependent upon the domestic acts of implementation. This explains why the Security Council is engaged in a continuous, though imperfect, process of reform of the listing procedure.

**54** However, even though the Security Council has indeed made some efforts in order to address the human rights concerns in the context of the global sanctions, the listing procedure still falls short of providing guarantees with respect to the rights to property, to private life, to the rights of the listed person to be informed of the accusations brought against him or her, and to be heard and judged (see Report of M Scheinin, Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism [6 August 2010]). Notably, the European courts wondered whether the creation of the Office of the Ombudsperson could substitute the requirement for the establishment of a form of judicial control of the listings (ECJ Joined Cases C-402/05 P and C-415/05 P *Kadi v Council* para. 285 and General Court Case T-85/09 *Kadi v Commission* para. 128). In the *Kadi saga*, the courts seem to have first given a negative answer. However, since 2010, the practice of the first Ombudsperson appears to have ensured the regional judges as to her impartiality and to the efficiency of the de-listing procedure (Joined Cases C-584/10 P, C-593/10 P and C-595/10 P *European Commission*,

*Council of the European Union, United Kingdom of Great Britain and Northern Ireland v Yassin Abdullah Kadi (Opinion of Advocate General Bot) [2013] paras 81–4).*

## D. A Variety of Sanctions?

**55** The question arises whether decisions taken by international organs other than the UN Security Council imposing measures restricting the rights of third States or entities, can qualify as sanctions, on the ground that they are collective measures or even whether a single State can resort to sanctions in order to have the international legal order respected by a wrongdoer. Such measures—which have become quite current—share with countermeasures their unilateral character and have been assimilated to them (see Sicilianos [2004] 19); but they borrow from sanctions the characteristics of being a form of law enforcement in the absence of any direct injury suffered by the sanctioning entity. The very diverse terminology used to designate them bears witness of this uncertainty (Dawidowicz counts not less than eight different denominations: ‘collective countermeasures; third-party countermeasures; third-State countermeasures; countermeasures of general interest; multilateral sanctions; multilateral countermeasures; solidarity measures and countermeasures *omnium*’—at 333).

**56** This ambiguity is reflected in Art. 54 ILC Articles according to which:

Measures taken by States other than an injured State

This chapter [II of Part III, on Counter-Measures] does not prejudice the right of any State, entitled under article 48, paragraph 1 to invoke the responsibility of another State, to take lawful measures against that State to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached.

**57** As noted by the ILC in the commentary of this important and ambiguous provision which has been compared to ‘the oracle at Delphi’ (Sicilianos [2010] 1144), ‘[t]he Article speaks of ‘lawful measures’ rather than ‘countermeasures’ so as not to prejudice any position concerning measures taken by States other than the injured State in response to breaches of obligations for the protection of the collective interest or those owed to the international community as a whole’ (ILC Articles, Commentary 139, para. 7).

**58** In spite of this hesitation, the practice of such ‘measures’—which have much in common with sanctions in the strict meaning of the word, with the exception of their institutionalized and centralized character—is increasing. And the explanation given by the ILC according to which ‘[p]ractice on this subject is limited and rather embryonic’ (ILC Articles, Commentary 137, para. 3) is hardly convincing: the Commission itself lists several examples which tend to show that, to the contrary, States (and some international organizations) are more and more inclined to resort to such means of enforcement as → *erga omnes obligations* in cases of serious violations. In a successful synthesis, Dawidowicz (2007) has convincingly established that these kinds of sanctions emanated from States on all continents (with the exception of Latin America) and from international organizations (see eg the European Communities sanctions against Greece [1970], Yugoslavia [1991], Myanmar [1997], and Zimbabwe [2002], or the sanctions decided by the Organisation of African Unity [‘OAU’] against Portugal [1963] and Israel [1993], or by the Economic Community of West African States [‘ECOWAS’] against Liberia [1980]) decided independently and sometimes in addition of UN sanctions.



**59** This trend is in line with the new, ‘post-Ago’ approach commonly accepted nowadays which rests on the elimination of the damage from the very definition of the international responsibility and the postulate that respect of certain fundamental obligations is due not to a particular State (or other individualized subject of international law) but to the international community as a whole (see Pellet [1996] 7–32). As long as international law was seen as a bundle of bilateral reciprocal obligations it was logical to stick to the Vattel principle according to which ‘selon le Droit des Gens, les représailles ne peuvent être accordées que pour maintenir les Droits des sujets de l’état, & non pour une affaire à laquelle la Nation n’a aucun intérêt’ [‘according to *ius gentium*, reprisals can be accepted only with the view to maintain the Rights of the subjects of the State and not for an issue about which the Nation has no interest’] (de Vattel *Droit des gens* [1758] Book II para. 348). However, a new conscience has emerged that some rules have a superior value and impose peremptory obligations *erga omnes* (see ICJ *Barcelona Traction, Light and Power Company, Limited* 32, para 33: ‘an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of → *diplomatic protection*. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*’). At this point the Grotian view resurfaces where ‘kings have the right to demand punishment not only on account of injuries committed against themselves or their subjects, but also on account of injuries which do not directly affect them but excessively violate the law of nature or of nations in regard to any persons whatsoever’ (Grotius *De iure belli ac pacis* [1646] Book II Chapter 20 para. 40).

**60** The main issue here is to find a fair balance ‘between the need for a more effective legal order in spite of decentralization, and the risks of abuse relating to the allocation of enforcement authority to individual States, even if limited to the most serious illegalities’ (Dawidowicz 347). Such a balance is still to be found and this might vindicate the caution shown by the ILC when it adopted Art. 54.

**61** There can be no doubt that there is a marked discrepancy between the very idea of sanctions on the one hand and the traditional international legal system which was characterized by its fundamental decentralization and the absence of any authority over the juxtaposed sovereign States. The simple fact that sanctions can be imposed by international institutions and, in some cases, by individual States or regional organizations, acting in the name of the international community, shows that this long-established analysis of international law is no longer tenable—even though it still accurately describes essential aspects of it, as shown by the survival of counter-measures as a valid means to react to internationally wrongful acts. The existence of sanctions bears witness to the slow establishment of the concept of community within the international legal order, in line with institutions like *ius cogens* or international crimes—whether committed by States, in which case the 2001 ILC Articles on State Responsibility speak of ‘a serious breach by State of an obligation arising under a peremptory norm of general international law’ (Art. 40), or by individuals.

## **E. The Nature of Autonomous Sanctions**

**62** In legal jargon the term ‘sanctions’ is equally used to designate restrictive measures that an individual State or international organization (like the EU: a list of EU legislation on restrictive measures can be found at <[http://eeas.europa.eu/cfsp/sanctions/index\\_en.htm](http://eeas.europa.eu/cfsp/sanctions/index_en.htm)> [24 August 2013]) chooses to take against another State or organisation, on an autonomous basis, as opposed to measures it is obliged to take by virtue of a UNSC resolution. Quite

often they are designated as ‘autonomous sanctions’ (Pellet [2012] 436–40; Portela [2010] 48–9).

**63** In practice, the ‘autonomous sanctions’ have been taken either in complement of Security Council mandated measures, or against a State subject to a regime of sanctions under Chapter VII United Nations Charter. For instance, the EU restrictive measures against Iran are twofold: on the one side, the EU is implementing the UNSC regime (see paras 19 and 37 above), on the other side, it supplements this regime by a series of measures that go beyond—*ratione materiae and ratione personae*—what is required by the SC resolutions. The second typology is when the UNSC members cannot agree on the imposition of sanctions. The ‘autonomous sanctions’ are then a surrogate for UNSC sanctions: the measures taken against Myanmar and Syria, for instance, by the EU (Council Regulation [EC] 194/2008 of 10 March 2008 on Renewing and Strengthening the Restrictive Measures in respect of Burma/Myanmar and Repealing Regulation [EC] No 817/2006 [2008] OJ L 66, 1 and Council Regulation [EC] 36/2012 of 19 January 2012 on Restrictive Measures in View of the Situation in Syria and Repealing Regulation [EU] No 442/2011 [2012] OJ L 16/1 respectively) but also by the United States (Executive Order 13047 of 20 May 1997 on Prohibiting New Investment in Burma and Executive Order 13582 of 18 August 2011 on Blocking Property of the Government of Syria and Prohibiting Certain Transactions with Respect to Syria respectively) and Australia (where the autonomous restrictive measures are imposed by means of amendment to a general act, either the Autonomous Sanctions Regulations 2011 or the Customs [Prohibited Exports] Regulations 1958; the sanctions against Myanmar were imposed on 24 October 2007; the sanctions against Syria, on 13 May 2011) are examples of these surrogate sanctions.

**64** Either complementary to or substitutive of the UNSC action, the nature of these restrictive measures is open to debate. The question arises whether they fall into the strict legal definition of ‘sanctions’. According to the strict definition of sanctions, lies the existence of an ‘organ competent first, to objectively establish the violation of a legal rule, and second to impose the coercive measures meant to constrain the targeted entity to restore the legality’ (para. 9 above). It is apparent that, in the case of the ‘autonomous sanctions’ both conditions are lacking: a regional international organization lacks any mandate from the international society to ascertain the violation of the international legality and to restore it vis-à-vis a State which is not a member of it. Even if the treaty creating that organization provides for a legal basis (eg Art. 215 TFEU), it is nonetheless *res inter alios acta* for the third State targeted by the punitive measure. Moreover, it is not always clear whether the aim of these measures is to restore the legality or to simply function as a tool of foreign policy, even though in practice they are taken in response to situations of international concern.

**65** These measures, whether taken by an individual State or a regional organization, better qualify as measures of → *retorsion* or as countermeasures, the distinctive feature being whether or not the punitive measures in question are taken as a response to an internationally wrongful act or not. Whereas the countermeasures are by definition a proportionate response to such an internationally wrongful act, the measures of retorsion, being internationally lawful acts, are not conditioned by the existence of a previous wrongful act; but they themselves must respect the law in force.

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